

Service Date: March 1, 2000

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
OF THE STATE OF MONTANA

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IN THE MATTER OF U S WEST	)	UTILITY DIVISION
COMMUNICATIONS, INC., Service	)	
Quality Reports	)	DOCKET NO. N99.10.230
	)	ORDER NO. 6205a

PROTECTIVE ORDER

U S West Communications, Inc. (USWC), has requested that the Public Service Commission (PSC or Commission) issue a Protective Order governing disclosure of certain information included in USWC service quality reports filed with the PSC pursuant to schedule or request. USWC's basis for the request is that some of the information, at least as reported in some of the ways in which it is required to be reported, is "trade secret" pursuant to § 69-3-105, MCA. More specifically, USWC argues that the disclosure of service quality information at any level (e.g., wire center, exchange) more specific than calling area would allow USWC's competitors a business advantage. USWC does not object to disclosure of its service quality information at the calling area level and levels more general (e.g., statewide aggregate).

The PSC determines the apparent nature of USWC service quality reports, when reported at levels more specific than calling areas, is such that it could be confidential trade secret. The PSC grants USWC's request and hereby orders that USWC service quality information reported by USWC at levels more specific than calling areas be submitted in accordance with this Protective Order and be treated as "confidential" under the terms of this Protective Order. It is further ordered that the following Protective Order provisions shall be in effect:

1. Confidential Information

(a) General All information, such as data, studies, documents, and other materials furnished pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery, or pursuant to Commission order, that are claimed by the provider of that information (provider) to be of a trade secret, privileged, or confidential nature shall be

furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting trade secret, confidential, or privileged commercial and financial information (hereinafter referred to as "confidential information" or "proprietary information"), and shall neither be used nor disclosed except for the purpose of this proceeding, and solely in accordance with this Order. All material claimed to be confidential information shall be submitted on yellow paper and so marked by the party or affiliate providing the information by stamping the same with a designation clearly indicating its trade secret, proprietary, or confidential nature in a fashion similar to "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. N99.10.230."

(b) Terms of Disclosure Proprietary information made available pursuant to the Order shall be given solely to counsel for the parties, the PSC and PSC staff, and shall not be used or disclosed except for the purposes of this docket, or as otherwise permitted by subsequent order of the PSC. Counsel may authorize access to confidential information by that party's experts as follows:

(i) Five days written notice (counted from the date of receipt by the providing party) shall be given to the party that produced the proprietary information. The notice shall contain the name, title, job description, description or previous positions and experience, and area of expertise of any person given access to such information. Any such expert may be an employee of a party, provided that such employee's duties are solely dedicated to regulatory activities on behalf of the party, and that such employee's duties are not related to marketing or strategic planning of competitive products or services, including those provided by any party to this proceeding.

(ii) If it is the good faith position of the party who produced the proprietary information that the designated person should not be given access to the information, that party must respond to the notice with written objection.

(iii) If the party that proposed that access be given to the designated person does not receive written objection by the party that produced the proprietary information within five days

after receipt of the written notice, counsel for that party shall be authorized to provide access to the information to the designated person.

(iv) If the party that produced the proprietary information objects to access by the designated person to proprietary information, the party that requested such access and the party that produced the information shall attempt to resolve the objection. If these parties are unable to resolve the objection, either of them may apply to the Commission for a ruling as to the access proposed. In that event, access to the information shall not be given to the designated person, pending resolution of the objection by the Commission.

(v) The standard to be applied by the Commission in determining a question of expert access to Proprietary information shall be whether access by the individual in question would be reasonably likely to jeopardize the confidential nature of the information sought. A party dissatisfied with a decision of the Commission may appeal to the District Court, and, pending appeal, the information shall not be disclosed to the designated person.

(vi) Any member of the Commission, its staff, the Montana Consumer Counsel, and its staff, may have access to any proprietary information made available pursuant to this order and shall be bound by the terms of this order.

(c) Nondisclosure Agreement. Prior to giving access to confidential information as contemplated in paragraph 1(b) above to any expert, counsel for the party seeking review of the confidential information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this Order. In connection therewith, confidential information shall not be disclosed to any person who has not signed a nondisclosure agreement in the form which is attached hereto and incorporated herein as Exhibit "A." Court reporters shall also sign an Exhibit "A." The nondisclosure agreement (Exhibit "A") shall require all persons to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that they have reviewed the same and consent to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party and to the Commission.

(d) Delivery of Documentation. Where feasible, confidential information will be marked as such and delivered to counsel. In the alternative, the confidential information may be made available for inspection and be reviewed by counsel and experts as defined in paragraph 1(a)-(c) herein in a place and a time mutually agreed on by the parties, or as directed by the Commission.

2. Challenge to Confidentiality.

(a) This Order establishes a procedure for the expeditious handling of information that a party claims is confidential; it shall not be construed as an agreement or ruling on the confidentiality of any such document. A party to this proceeding or other person or entity with proper standing, or the Commission on its own motion, may challenge the providing party's claim of confidentiality at any time. Any such petition or motion must be served upon the providing party, and the providing party may file a response or objection within 14 days thereafter. The providing party's response may also request hearing or oral argument before the Commission, including the grounds for such request.

(b) In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute trade secret, confidential, or privileged commercial and financial information, the party objecting to the trade secret claim shall forthwith submit the said matters to the Commission for its review pursuant to this Order. When the Commission rules on the question of whether any documents, data, information, studies, or other matters submitted to it for review and determination are, or are not, confidential information, the Commission will enter an order resolving the issue.

(c) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents that have been designated as confidential information or which were accepted into the sealed record in accordance with this Order removed from the protective requirements of this Order or from the sealed record and placed in the public record. If the confidential or proprietary nature of this information is challenged, resolution of the issue shall be made by a hearing examiner or the Commission after proceedings in camera, which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential matter shall be present. The record of such in camera hearings shall

be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. N99.10.230." It shall be transcribed only upon agreement by the parties or Order of the Hearing Examiner or the Commission, and in that event shall be separately bound, segregated, sealed, and withheld from inspection by any person not bound by the terms of this Order, unless and until released from the restrictions of this Order either through agreement of the parties, or after notice to the parties and hearing, pursuant to an Order of the Hearing Examiner or the Commission. In the event that the Hearing Examiner or the Commission should rule in response to such a pleading that any information should be removed from the protective requirements of this Order or from the protection of the sealed record, the parties, at the request of the providing party and to enable the providing party to seek a stay or other relief, shall not disclose such information or use it in the public record for five (5) business days.

3. Seal. While in the custody of the Commission, materials subject to this Order shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN DOCKET NO. N99.10.230," and due to their trade secret nature they shall not be considered as records in the possession or retained by the Commission within the meaning of the open meetings or public records statutes.

4. Use in Pleadings, Briefs, etc. Where reference to confidential information in the sealed record is required in pleadings, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other nonconfidential description. Any further use of or substantive references to confidential information shall be placed in a separate section of the pleading or brief and submitted to the Commission under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed an Exhibit "A." All protection afforded in this Order apply to materials prepared and distributed under this paragraph.

5. (a) Use in Decisions and Orders. The Hearing Examiner or the Commission will attempt to refer to confidential information in only a general or summary form and will avoid reproduction in any decision of confidential information to the greatest possible extent. If it is necessary for a determination in this proceeding to discuss confidential information other than in a general or summary form, it shall be placed in a separate section of the Order or decision under

seal. This sealed section shall be served only on counsel of record (one copy each) who have signed an Exhibit "A." Counsel for other parties shall receive the cover sheet to the sealed portion and may review the sealed portion on file with the Commission once they have signed an Exhibit "A."

(b) Summary of Proprietary Information. In all instances when material is filed with the Commission pursuant to this Order which is considered to be confidential information, the provider shall concurrently file a brief non-proprietary written summary of the confidential information. In other instances, if deemed necessary by the Commission, the provider shall prepare a written summary of the confidential information referred to in a Commission decision or Order, for placement in the public record.

6. Segregation of Files. All confidential information filed with the Commission will be sealed by the Commission, segregated in the files of the Commission, and withheld from inspection by any person not bound by the terms of this Order, unless such confidential information is released from the restrictions of this Order either through agreement of the parties or, after notice to the parties and hearing, pursuant to the Order of the Commission or final order of a Court having jurisdiction. All written confidential information coming into the possession of the Montana Consumer Counsel under this Order may be retained by it in its office files, but shall be withheld from inspection by others, except for its staff and experts, unless released by the Commission or a final order of a court under this paragraph and subject always to the terms of paragraph 7 of this Order.

7. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any confidential information by reason of this Order shall neither use nor disclose the confidential information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of this proceeding, and then solely as contemplated herein, and shall take reasonable precautions to keep the confidential information secure and in accordance with the purposes and intent of this Order.

8. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all

data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or cross-examination on the grounds of relevancy or materiality.

This Order shall in no way constitute any waiver of the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege, and to appeal any such determination of the Commission or such assertion by a party.

Done and dated this 30th day of November, 1999, by a vote of 4-1.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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DAVE FISHER, Chair

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NANCY MCCAFFREE, Vice Chair

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BOB ANDERSON, Commissioner

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GARY FELAND, Commissioner

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BOB ROWE, Commissioner  
(Voting to Dissent – Dissent Attached)

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.



DISSENT OF COMMISSIONER ROWE

Information about quality is basic to any informed customer choice. Indeed, it is impossible to know a service's true price without knowing something about its quality. While the prospect of competition might make some information somewhat more valuable to prospective competitors, it certainly makes service quality information a more legitimate area of customer interest.

The Commission's decision lacks rigor. Contrary conclusions were reached by the Colorado and Oregon commissions, which, after thoughtful analysis, rejected trade secret claims and required that wire center information be disclosed. Generally, competitive entry decisions appear much more likely to be based on density or number of lines per wire center than on service quality within a wire center. Also, because the reported data is historical, U S WEST would have the opportunity to improve its performance before the data is released, negating any possible competitive benefit another firm might have from targeting a particular wire center. To the best of my knowledge, the Montana PSC is the only commission in the region which has granted confidentiality for this basic service quality information.

In a situation such as this, trade secret claims should be supported with more than the assertions that were provided here. Customers should be able know with some particularity the quality of service they are purchasing .

Respectfully submitted this 30th day of November, 1999.

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BOB ROWE, Commissioner

EXHIBIT "A"

I have reviewed the foregoing Protective Order in U S WEST Communications, Inc.'s Docket No. N99.10.230 dated November 30, 1999 and agree to be bound by the terms and conditions of such order.

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Signature

\_\_\_\_\_  
Typed or Printed Name

\_\_\_\_\_  
Employer or Firm

\_\_\_\_\_  
Business Address

\_\_\_\_\_  
Party

\_\_\_\_\_  
Date